



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 5, 1997

Mr. Merrill E. Nunn
City Attorney
City of Amarillo
P. O. Box 1971
Amarillo, Texas 79105-1971

OR97-0262

Dear Mr. Nunn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103572.

The City of Amarillo (the "city") received an open records request for the incident "report on the accidental death of a [certain named individual] . . . and copies of the photographs taken of the accident scene." You submitted to this office for review the requested records and assert that the information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation "to which the state or a political subdivision is or may be a party." The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated and that (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for the information to be excepted under section 552.103(a).

You assert that all of the information submitted is excepted from required public disclosure under section 552.103, based on anticipated litigation because you claim the city has been threatened with litigation. The city has submitted a copy of a notice of claim letter, that states it is "given under the Texas Tort Claims Act ["TTCA"] and pursuant to the municipality's notice requirements," regarding the incident which is the subject of the request for information. The notice of claim letter further advises the city that an attorney has been retained, who alleges that the city is responsible for the accident. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments

and promises further legal action if they are not forthcoming. *Id.*; see also Open Records Decision Nos. 555 (1990), 346 (1982). In this instance, based on this evidence and review of the submitted documents, our office concludes that the city has established that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation.¹ Therefore, you may withhold the requested information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.² Open Records Decision Nos. 349 (1982), 320 (1982). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Sam Haddad
Assistant Attorney General
Open Records Division

SH/cbh

Ref.: ID# 103572

¹The city did not make an affirmative representation that the notice of claim letter complies with the requirements of the TTCA, and thus has not met one of the tests set forth in Open Records Decision No. 638 (1996) to determine that litigation is reasonably anticipated. Nonetheless, this office finds that based on the specific facts in this situation, the city has provided sufficient evidence to establish that litigation is reasonably anticipated under section 552.103 of the Government Code. We note that if in the future you wish to assert that section 552.103(a) is applicable on the basis of the city's receipt of a notice of claim letter, you should affirmatively represent to this office that the letter complies with the requirements of the TTCA.

²In particular, we note that front page offense report information may not be withheld from disclosure under section 552.103. See Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report).

Enclosures: Submitted documents

cc: Ms. Kris Kelly, Staff Writer
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